

AMENDED IN ASSEMBLY AUGUST 23, 2004

AMENDED IN ASSEMBLY JUNE 23, 2004

AMENDED IN SENATE MAY 25, 2004

AMENDED IN SENATE MAY 24, 2004

AMENDED IN SENATE MAY 4, 2004

AMENDED IN SENATE APRIL 12, 2004

SENATE BILL

No. 1793

Introduced by Senator McPherson

February 20, 2004

An act to add and repeal Article 6.9 (commencing with Section 20209.20) of Chapter 1 of Part 3 of Division 2 of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

SB 1793, as amended, McPherson. Public contracts: design-build contracting: transportation authorities.

(1) Existing law sets forth requirements for the solicitation and evaluation of bids and the awarding of contracts by public entities for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement. Existing law also authorizes specified state agencies, cities, and counties to implement alternative procedures for the awarding of contracts on a design-build basis. Existing law, until January 1, 2005, authorizes transit operators to enter into a design-build contract, as defined, according to specified procedures.

This bill would authorize, until January 1, 2010, certain transportation authorities to use a design-build process for bidding on one highway construction project within the jurisdiction of the applicable transportation authority, that includes a requirement that design-build entity bidders provide certain information in a questionnaire submitted to the transportation authority that is verified under oath. Because a verification under oath is made under penalty of perjury, the bill would, by requiring a verification, create a new crime and thereby impose a state-mandated local program. The bill would require these transportation authorities to report to the Legislature regarding implementation of the design-build process.

(2) This bill would require the Bureau of State Audits to conduct a pre-project and post-project audit of each project and to compare them to similar design-bid-build or design sequencing projects and report the results to the Legislature, as provided.

(3) This bill would make legislative findings and declarations as to the necessity of a special statute.

(4) This bill would specify that it shall not become operative unless both SB 1210 and AB 3048 are chaptered on or before January 1, 2005.

(5) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

~~Existing law authorizes specified state agencies, cities, and counties to implement alternative procedures for the awarding of contracts on a design-build basis.~~

~~Existing law also, until January 1, 2005, authorizes transit operators to enter into a design-build contract, as defined, according to specified procedures.~~

~~This bill would express the Legislature's intent to explore the use of alternate methods of financing and delivering transportation projects in this state, including design build, design sequencing, and various forms of private financing, including tolls.~~

~~Vote: majority. Appropriation: no. Fiscal committee: no—yes. State-mandated local program: no—yes.~~

The people of the State of California do enact as follows:

~~SECTION 1. It is the intent of the Legislature to explore the use of alternate methods of financing and delivering transportation projects in this state, including design build, design sequencing, and various forms of private financing, including tolls.~~

SECTION 1. Article 6.9 (commencing with Section 20209.20) is added to Chapter 1 of Part 3 of Division 2 of the Public Contract Code, to read:

Article 6.9. Transportation Authority Design-Build
Collaboration Contracts

20209.20. The Legislature finds and declares all of the following:

(a) It is the intent of the Legislature, in enacting this article, to:

(1) Demonstrate an alternative and optional procedure for bidding on one highway construction project each in the jurisdiction of any transportation authority established in the County of San Diego under Chapter 2 (commencing with Section 132000) of Division 12.7 of the Public Utilities Code, the Santa Clara Valley Transportation Authority established under Part 12 (commencing with Section 100000) of the Public Utilities Code, and the Transportation Agency of Monterey County established under Title 7.92 (commencing with Section 67920) of the Government Code.

(2) Authorize the Department of Transportation to demonstrate an alternative bidding procedure for two highway projects on the state highway system.

(b) (1) These transportation authorities should be able to utilize cost-effective options for delivery of highway projects, in accordance with the national trend, that includes authorizing public entities to utilize design-build contracts as a project delivery method.

(2) Utilizing a design-build contract requires a clear understanding of the roles and responsibilities of each participant in the design-build process. The benefits of a design-build contract project delivery system include an accelerated completion of the projects, cost containment, reduction of construction complexity, and reduced exposure to risk for the transportation authority.

1 (3) *This approach toward the design-build project delivery*
2 *method should be evaluated for the purposes of exploring the*
3 *potential for reduced project costs, expedited project completion,*
4 *or design features not achievable through the design-bid-build*
5 *method.*

6 (c) *For the purposes of this demonstration, it is important to*
7 *select projects for which funding has been identified or*
8 *programmed and are ready or are near ready for construction. It*
9 *is also important to select projects that range in cost for the*
10 *demonstration program.*

11 (d) *These projects are subject to the existing process under the*
12 *state transportation improvement program (Chapter 2*
13 *(commencing with Section 14520) of Part 5.3 of Division 3 of the*
14 *Government Code) for planning, programming, environmental*
15 *clearance, and funding. Projects that are either identified in this*
16 *article or ultimately chosen for demonstration of the design-build*
17 *collaboration project delivery method under this article must*
18 *comply with all existing requirements under the state*
19 *transportation improvement program for project development and*
20 *funding. This article shall not confer any type of competitive*
21 *advantage upon the projects in this article, relative to other*
22 *projects subject to the state transportation improvement program,*
23 *during other phases of project development.*

24 20209.22. *For the purposes of this article, the following*
25 *definitions apply:*

26 (a) *“Best value” means a value determined by objective*
27 *criteria, including, but not limited to, price, features, functions, life*
28 *cycle costs, and other criteria deemed appropriate by the*
29 *transportation authority.*

30 (b) *“Design-build” means a procurement process in which*
31 *both the design and construction of a project are procured from a*
32 *single entity.*

33 (c) *“Design-build entity” means a partnership, corporation, or*
34 *other legal entity that is able to provide appropriately licensed*
35 *contracting, architectural, and engineering services as needed*
36 *pursuant to a design-build contract.*

37 (d) *“Transportation authority” means any transportation*
38 *authority established in the County of San Diego under Chapter*
39 *2 (commencing with Section 132000) of Division 12.7 of the Public*
40 *Utilities Code, the Santa Clara Valley Transportation Authority*

1 *established under Part 12 (commencing with Section 100000) of*
2 *that code and the Transportation Agency of Monterey County*
3 *established under Title 7.92 (commencing with Section 67920) of*
4 *the Government Code.*

5 *(e) “Department” means the Department of Transportation as*
6 *established under Part 5 (commencing with Section 14000) of*
7 *Division 3 of the Government Code.*

8 *20209.23. For the purposes of demonstrating the*
9 *design-build approach:*

10 *(a) The San Diego Association of Governments, the Santa*
11 *Clara Valley Transportation Authority, and the Transportation*
12 *Agency of Monterey County are each authorized to utilize the*
13 *design-build procurement method for one highway construction*
14 *project, provided that the project has a total cost of not less than*
15 *fifty million dollars (\$50,000,000).*

16 *(b) The Department of Transportation is authorized to utilize*
17 *the design-build procurement method for two highway*
18 *construction projects on the state highway system, provided that*
19 *the projects each have a total cost of not less than fifty million*
20 *dollars (\$50,000,000).*

21 *20209.24. The department or the transportation authority*
22 *shall implement for design-build projects a labor compliance*
23 *program as described in Section 1771.5 of the Labor Code, or it*
24 *shall contract with a third party to implement on the authority’s*
25 *behalf a labor compliance program subject to that statute. This*
26 *requirement does not apply to any project where the transportation*
27 *authority or the design-build entity has entered into any collective*
28 *bargaining agreement or agreements that bind all of the*
29 *contractors performing work on the projects.*

30 *20209.26. Bidding for design-build highway projects shall*
31 *progress as follows:*

32 *(a) The department or the transportation authority shall*
33 *prepare a set of documents setting forth the scope of the project.*
34 *The documents may include, but need not be limited to, the size,*
35 *type, and desired design character of the project, performance*
36 *specifications covering the quality of materials, equipment, and*
37 *workmanship, preliminary plans, and any other information*
38 *deemed necessary to describe adequately the transportation*
39 *authority’s needs. The performance specifications and any plans*

1 shall be prepared by a design professional who is duly licensed and
2 registered in California.

3 (b) Based on the documents prepared under subdivision (a), the
4 transportation authority shall prepare a request for proposals that
5 invites interested parties to submit competitive sealed proposals in
6 the manner prescribed by the transportation authority. The request
7 for proposals shall include, but need not be limited to, the
8 following elements:

9 (1) Identification of the basic scope and needs of the project or
10 contract, the expected cost range, the methodology that will be
11 used by the transportation authority to evaluate proposals,
12 whether the contract will be awarded to the lowest responsible
13 bidder, and any other information deemed necessary by the
14 transportation authority to inform interested parties of the
15 contracting opportunity.

16 (2) Significant factors that the transportation authority
17 reasonably expects to consider in evaluating proposals, including,
18 but not limited to, cost or price and all nonprice related factors.

19 (3) The relative importance of the weight assigned to each of
20 the factors identified in the request for proposals.

21 (4) If a nonweighted system is used, the transportation
22 authority shall specifically disclose whether all evaluation factors
23 other than cost or price when combined are any of the following:

24 (A) Significantly more important than cost or price.

25 (B) Approximately equal in importance to cost or price.

26 (C) Significantly less important than cost or price.

27 (5) If the transportation authority reserves the right to hold
28 discussions or negotiations with responsive bidders, it shall so
29 specify in the request for proposals and shall publish separately or
30 incorporate into the request for proposals applicable rules and
31 procedures to be observed by the transportation authority to
32 ensure that any discussions or negotiations are conducted in good
33 faith.

34 (c) (1) The transportation authority shall establish a
35 procedure to prequalify design-build entities using a standard
36 questionnaire prepared by the transportation authority. In
37 preparing the questionnaire, the transportation authority shall
38 consult with the construction industry, including, but not limited
39 to, representatives of the building trades and surety industry. This

1 *questionnaire shall require information including, but not limited*
2 *to, all of the following:*

3 (A) *If the design-build entity is a partnership, limited*
4 *partnership, or other association, a listing of all of the partners,*
5 *general partners, or association members known at the time of bid*
6 *submission who will participate in the design-build contract.*

7 (B) (i) *Evidence that the lead member of the design-build*
8 *entity has completed a state highway project in California with a*
9 *value of at least fifty million dollars (\$50,000,000) in the past 10*
10 *years.*

11 (ii) *Evidence that the members of the design-build entity have*
12 *completed, or demonstrated the experience, competency,*
13 *capability, and capacity to complete projects of similar size, scope,*
14 *or complexity, and that proposed key personnel have sufficient*
15 *experience and training to competently manage and complete the*
16 *design and construction of the project, as well as a financial*
17 *statement that assures the transportation authority that the*
18 *design-build entity has the capacity to complete the project.*

19 (C) *The licenses, registration, and credentials required to*
20 *design and construct the project, including, but not limited to,*
21 *information on the revocation or suspension of any license,*
22 *credential, or registration.*

23 (D) *Evidence that establishes that the design-build entity has*
24 *the capacity to obtain all required payment and performance*
25 *bonding, liability insurance, and errors and omissions insurance.*

26 (E) *Information concerning workers' compensation*
27 *experience history and a worker safety program.*

28 (F) *A full disclosure regarding all of the following that are*
29 *applicable:*

30 (i) *Any serious or willful violation of Part 1 (commencing with*
31 *Section 6300) of Division 5 of the Labor Code or the federal*
32 *Occupational Safety and Health Act of 1970 (Public Law 91-596),*
33 *settled against any member of the design-build entity.*

34 (ii) *Any debarment, disqualification, or removal from a federal,*
35 *state, or local government public works project.*

36 (iii) *Any instance where the design-build entity, or its owners,*
37 *officers, or managing employees submitted a bid on a public works*
38 *project and were found to be nonresponsive, or were found by an*
39 *awarding body not to be a responsible bidder.*

1 (iv) Any instance where the design-build entity, or its owners,
2 officers, or managing employees defaulted on a construction
3 contract.

4 (v) Any violations of the Contractors' State License Law, as
5 described in Chapter 9 (commencing with Section 7000) of
6 Division 3 of the Business and Professions Code, excluding
7 alleged violations of federal or state law regarding the payment of
8 wages, benefits, apprenticeship requirements, or personal income
9 tax withholding, or Federal Insurance Contribution Act (FICA)
10 withholding requirements settled against any member of the
11 design-build entity.

12 (vi) Any bankruptcy or receivership of any member of the
13 design-build entity, including, but not limited to, information
14 concerning any work completed by a surety.

15 (vii) Any settled adverse claims, disputes, or lawsuits between
16 the owner of a public works project and any member of the
17 design-build entity during the five years preceding submission of
18 a bid under this article, in which the claim, settlement, or judgment
19 exceeds fifty thousand dollars (\$50,000). Information shall also be
20 provided concerning any work completed by a surety during this
21 period.

22 (G) In the case of a partnership or any association that is not
23 a legal entity, a copy of the agreement creating the partnership or
24 association and specifying that all partners or association
25 members agree to be fully liable for the performance under the
26 design-build contract.

27 (2) The information required under this subdivision shall be
28 verified under oath by the entity and its members in the manner in
29 which civil pleadings in civil actions are verified. Information
30 required under this subdivision that is not a public record under the
31 California Public Records Act, as described in Chapter 3.5
32 (commencing with Section 6250) of Division 7 of Title 1 of the
33 Government Code, shall not be open to public inspection.

34 (d) The department or the transportation authority shall
35 establish a procedure for final selection of the design-build entity.
36 Selection shall be based on either of the following criteria:

37 (1) A competitive bidding process resulting in lump-sum bids
38 by the prequalified design-build entities. Awards shall be made to
39 the lowest responsible bidder.

1 (2) A design-build competition based upon best value and other
2 criteria set forth in subdivision (b). The design-build competition
3 shall include the following elements:

4 (A) Competitive proposals shall be evaluated by using only the
5 criteria and selection procedures specifically identified in the
6 request for proposal. However, the following minimum factors
7 shall each represent at least 10 percent of the total weight of
8 consideration given to all criteria factors:

9 (i) Price.

10 (ii) Technical design and construction expertise.

11 (iii) Life cycle costs over 15 years or more.

12 (iv) Skilled labor force availability, determined by the existence
13 of an agreement with a registered apprenticeship program,
14 approved by the California Apprenticeship Council.

15 (v) Acceptable safety record. A bidder's safety record shall be
16 deemed acceptable if its experience modification rate for the most
17 recent three-year period is an average of 1.00 or less, and its
18 average total recordable injury/illness rate and average lost work
19 rate for the most recent three-year period does not exceed the
20 applicable statistical standards for its business category or if the
21 bidder is a party to an alternative dispute resolution system as
22 provided for in Section 3201.5 of the Labor Code.

23 (B) When the evaluation is complete, the top three responsive
24 bidders shall be ranked sequentially from the most advantageous
25 to the least advantageous.

26 (C) The award of the contract shall be made to the responsible
27 bidder whose proposal is determined to be the most advantageous.

28 (D) Notwithstanding any other provision of this code, upon
29 issuance of a contract award, the transportation authority shall
30 publicly announce its award, identifying the contractor to whom
31 the award is made, along with a written decision supporting its
32 contract award and stating the basis of the award. The notice of
33 award shall also include the transportation authority's second and
34 third ranked design-build entities.

35 (E) The written decision supporting the transportation
36 authority's contract award, described in subparagraph (D), and
37 the contract file must provide sufficient information to satisfy an
38 external audit.

1 20209.27. (a) No firm that is hired or paid by the department
2 or the transportation authority to perform pre-bid services may bid
3 or join with another company to bid for the design-build contract.

4 (b) For purposes of this article, pre-bid services include
5 preliminary engineering studies and another other activities that
6 lead to the selection of a project alternative. These activities
7 encompass a variety of tasks, including, but not limited to, the
8 following activities:

9 (1) Project geometric design.

10 (2) Earthwork calculations.

11 (3) Preparation of cross sections.

12 (4) Drainage design.

13 (5) Construction staging design.

14 20209.28. (a) Any design-build entity that is selected to
15 design and build a project under this article shall possess or obtain
16 sufficient bonding to cover the contract amount for nondesign
17 services, and errors and omission insurance coverage sufficient to
18 cover all design, engineering, and architectural services provided
19 in the contract. This section does not prohibit a general or
20 engineering contractor from being designated the lead entity on a
21 design-build project for the purposes of purchasing necessary
22 bonding to cover the activities of the design-build entity.

23 (b) Any payment or performance bond written for the purposes
24 of this article shall be written using a bond form developed by the
25 Department of General Services under subdivision (i) of Section
26 14661 of the Government Code.

27 20209.30. All bids by subcontractors that were not listed by
28 the design-build entity in accordance with subparagraph (A) of
29 paragraph (1) of subdivision (c) of Section 20209.26 shall be
30 considered by the design-build entity in accordance with the
31 design-build process set forth by the transportation authority in
32 the design-build package. All bids by subcontractors bidding on
33 contracts under this article shall be subject to Chapter 4
34 (commencing with Section 4100) of Part 1 of Division 2. The
35 design-build entity shall do both of the following:

36 (a) Provide public notice of the availability of work to be
37 subcontracted in accordance with the publication requirements
38 applicable to the competitive bidding process of the transportation
39 authority.

1 ***(b) Provide a fixed date and time on which the subcontracted***
2 *work will be awarded in accordance with the procedure*
3 *established under this article.*

4 20209.32. *A deviation from the performance criteria and*
5 *standards established under subdivision (a) of Section 20209.26*
6 *may not be authorized except by written consent of the*
7 *transportation authority.*

8 20209.34. *(a) The local transportation authority shall*
9 *consult with the Department of Transportation in identifying those*
10 *demonstration projects to be performed on the state highway*
11 *system that are described in this article.*

12 ***(b) The Department of Transportation shall establish the***
13 *parameters for the extent of the participation of its employees in*
14 *this demonstration program.*

15 ***(c) For projects that are on the state highway system, the***
16 *Department of Transportation shall perform the construction*
17 *inspection including surveying and testing the materials for each*
18 *of the projects. All design related documents shall be public*
19 *records.*

20 20209.36. *Quality control inspection for the construction of*
21 *any highway construction project utilizing the design-build*
22 *collaboration approach authorized by this article may not be*
23 *performed by the design-build contractor for the project.*

24 20209.38. *Nothing in this article affects, expands, alters, or*
25 *limits any rights or remedies otherwise available at law.*

26 20209.40. *(a) The retention proceeds withheld by a*
27 *transportation authority from a design-build entity shall not*
28 *exceed 5 percent.*

29 ***(b) The transportation authority shall not withhold retention***
30 *from payments to a design-build entity for actual costs incurred*
31 *and billed or design services, construction management services,*
32 *or where applicable, for completed operations and maintenance*
33 *services.*

34 ***(c) In a contract between a design-build entity and a***
35 *subcontractor; and in a contract between a subcontractor and any*
36 *subcontractor thereunder, the percentage of the retention proceeds*
37 *withheld may not exceed the percentage specified in the contract*
38 *between the transportation authority and the design-build entity.*
39 *If the design-build entity provides written notice to any*
40 *subcontractor who is not a member of the design-build entity, prior*

1 to or at the time that the bid is requested, that a bond may be
2 required and the subcontractor subsequently is unable or refuses
3 to furnish a bond to the design-build entity, then the design-build
4 entity may withhold retention proceeds in excess of the percentage
5 specified in the contract between the transportation authority and
6 the design-build entity from any payment made by the design-build
7 entity to the subcontractor.

8 (d) In accordance with the provisions of applicable state law,
9 the design-build entity may be permitted to substitute securities in
10 lieu of the withholding from progress payments specified in
11 subdivision (b). Substitutions shall be made in accordance with
12 Section 22300.

13 20209.42. Not later than three years after the design-build
14 contract is awarded, the transportation authority shall submit a
15 progress report to the Senate Committee on Transportation, and
16 the Assembly Committee on Transportation. The progress report
17 shall include, but shall not be limited to, all of the following
18 information:

19 (a) A description of the project.

20 (b) The estimated and actual project costs.

21 (c) The design-build entity that was awarded the project.

22 (e) A description of any written protests concerning any aspect
23 of the solicitation, bid, proposal, or award of the design-build
24 project, including, but not limited to, the resolution of the protests.

25 (f) An assessment of the prequalification process and criteria.

26 (g) An assessment of the impact of limiting retention to 5
27 percent on the project, as required under Section 20209.40.

28 (h) A description of the labor force compliance program
29 required under Section 20209.24, and an assessment of the impact
30 on a project where compliance with that program is required.

31 (i) A description of the method used to award the contract. If
32 best value was the method, the factors used to evaluate the bid shall
33 be described, including the weighting of each factor and an
34 assessment of the effectiveness of the methodology.

35 (j) An assessment of the project impact of the “skilled labor
36 force availability” requirement imposed under clause (iv) of
37 subparagraph (A) of paragraph (2) of subdivision (d) of Section
38 20209.26.

39 (k) Recommendations regarding the most appropriate uses for
40 the design-build collaborative approach.

1 20209.44. This article shall remain in effect only until
2 January 1, 2010, and as of that date is repealed.

3 SEC. 2. The Bureau of State Audits shall conduct a pre-project
4 and post-project audit of each project and compare them to similar
5 design-bid-build or design sequencing projects and report the
6 results to the Legislature. The bureau's final report shall be
7 delivered to the Legislature after each of the projects has been in
8 operation for five years.

9 SEC. 3. The Legislature finds and declares that a special law
10 is necessary and that a general law cannot be made applicable
11 within the meaning of Section 16 of Article IV of the California
12 Constitution because of the unique need of the San Diego
13 Association of Governments, the Santa Clara Valley
14 Transportation Authority, the Los Angeles County Metropolitan
15 Transportation Authority, and the Santa Cruz County Regional
16 Transportation Commission to be able to utilize cost-effective
17 options for the delivery of highway projects.

18 SEC. 4. This act shall not become operative unless both SB
19 1210 and AB 3048 are also chaptered on or before January 1,
20 2005.

21 SEC. 5. No reimbursement is required by this act pursuant to
22 Section 6 of Article XIII B of the California Constitution because
23 the only costs that may be incurred by a local agency or school
24 district will be incurred because this act creates a new crime or
25 infraction, eliminates a crime or infraction, or changes the penalty
26 for a crime or infraction, within the meaning of Section 17556 of
27 the Government Code, or changes the definition of a crime within
28 the meaning of Section 6 of Article XIII B of the California
29 Constitution.